Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-815

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOBE NEWSPAPER COMPANY,
PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

JONATHAN M. ALBANO*
MARK W. BATTEN
ALICIA L. DOWNEY
BINGHAM, DANA & GOULD
150 Federal Street
Boston, MA 02110
(617) 951-8000

Counsel of Record

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

6PP

In the
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-815

GLOBE NEWSPAPER COMPANY,
PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

Petitioner Globe Newspaper Company (Globe) submits this Reply to the Brief for the United States in Opposition to Globe's Petition for a Writ of Certiorari.

ARGUMENT

1. The Court of Appeals held that the First Amendment permitted a rule of presumptive closure for juvenile proceedings. Pet. App. at A13 (closure of juvenile trials "is not an exception to some general rule of openness, but the norm."). This standard of presumptive closure belies any contention that the Court of Appeals did not decide whether the

public's right to attend juvenile trials is commensurate with its right to attend adult proceedings (which are presumptively *open* to the public) and further demonstrates that the Court of Appeals did not apply "the 'extremely stringent' First Amendment standards governing closure of adult criminal trials." Opp. at 5.

2. The Court of Appeals' decision is not in accord with that of the Third Circuit Court of Appeals in *United States* v. *A.D.*, 28 F.3d 1353 (3d Cir. 1994). The Third Circuit Court of Appeals held that the standard governing juvenile proceedings was consistent with the public's common law right of access to judicial proceedings and documents — a right of presumptive access, not presumptive closure. 28 F.3d at 1361 and n.7.

3. Neither of the courts below required or made "specific findings. . .demonstrating that, first, there is a substantial probability that" the juveniles' rehabilitative interests "will be prejudiced by publicity that closure would prevent," and, second, that "reasonable alternatives to closure cannot adequately protect" those interests. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 14 (1986); Opp. at 8-10.

a. The preference of juveniles for closure in order to protect their statutory confidentiality interests is entitled to no greater weight than the preference of adult criminal defendants who seek closure to protect their constitutionally protected right to a fair trial. A mere finding that a juvenile's preference for closure is "relevant to the rehabilitative goals of the juvenile justice system" (Opp. 7) cannot satisfy the constitutional standard.

b. The record contains no evidence that the prosecutor's preference for closure was based upon the statutory criteria governing the decision of whether to try a juvenile as an adult, 18 U.S.C. 5032, nor did the District Court make any findings that the statutory criteria were

in fact satisfied (even assuming, *arguendo*, that those criteria govern the public's access rights).

c. The courts below failed to consider the extent to which the prior lawful publicity concerning the identities of the juveniles and the acts with which they were charged rendered the closure order "an exercise in futility." Pet. App. at A16. *Compare Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 110 & n.3 (1979) (Rehnquist, J.).

d. Congress' general finding that secrecy protects juveniles from stigma (Opp. 6) is no substitute for a specific finding in this case that closure is essential to prevent stigma to *these* juveniles, that it would be effective in preventing stigma despite the extensive lawful publicity concerning these juveniles and their offenses, and that closure was the only way to achieve those goals. *Cf. Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607-609 (1982) (reliance on general legislative determination rather than case-by-case examination "cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest").

4. The courts below, like the Government, failed to consider properly the intense public interest in the juvenile delinquency system. Pet. App. at A14 n.7 (finding that the heinous nature of the juveniles' conduct and the resulting public concern and outrage militated in favor of closure). Since the Petition was filed, the American Bar Association Juvenile Justice Center, in conjunction with the Youth Law Center and Juvenile Law Center, issued a report documenting pervasive problems of the juvenile justice system and the mounting public concern about the system. *See A Call for Justice, An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (American Bar Association 1995). The ABA's findings included the following:

a. "The assessment raised serious concerns that the interests of many young people in juvenile court are significantly compromised, and that many young children are literally left defenseless." *Id.* at 6-7.

b. "State studies reveal that nonwhite youths are at even greater disadvantage than their white counterparts at several, if not all stages of representation. Nonwhite youths are not only overrepresented in the system, they are also treated more harshly." *Id.* at 3.

c. "One of the most disturbing findings of the assessment is that large numbers of youth across the country appear in juvenile court without lawyers: for example, 34% of the public offender offices surveyed reported that some percentage of youth in juvenile courts in which they work 'waive' their right to counsel at the detention hearing." *Id.* at 7.

5. The ABA's report provides further support for this Court to resolve the question of whether and to what extent the First Amendment affords the public a right of access to juvenile proceedings:

> The juvenile justice system in our country is at the center of public debate. The public is concerned about juvenile crime, particularly violent crime. Congress, state legislatures, and executive agencies have insisted that the juvenile courts respond with more punitive sanctions, longer periods of confinement for many youthful offenders, and increased handling of juveniles in adult criminal courts.
>
> These measures have important consequences for youth in juvenile court who need effective representation to ensure that they are not held unnecessarily in secure detention, improperly transferred to adult criminal court, or inappropriately committed to institutional confinement. Society at large also has important interests at

> stake, including the desire for appropriate and effective sanctions for juvenile offenders and the enormous costs of increased incarceration and building new juvenile facilities at a time when state and local budgets are already severely stretched.

Id. at 4-5.

6. Whether the First Amendment protects the public's ability to inform itself about the operation of the juvenile justice system, to serve as a check against ongoing abuses within that system, and to intelligently evaluate the need for additional legislative reforms, are important, undecided questions that have divided the lower courts and which ought to be resolved by this Court.

CONCLUSION

For the foregoing reasons, and for those contained in Globe's Petition, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

GLOBE NEWSPAPER COMPANY
By its attorneys,

Jonathan M. Albano*
Mark W. Batten
Alicia L. Downey
Bingham, Dana & Gould
150 Federal Street
Boston, MA 02110
(617) 951-8000

Counsel of Record